Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-895

BRUCE WHEATON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioner, BRUCE WHEATON, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 29, 1976.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. A judgment of conviction for violation of Title 21, United States Code, §§812, 841(a)(1), 841(b)(1)(A), 846, 951, 952(a), 963, and Title 18, United States Code, §2, was entered on May 11, 1976 by the District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on November 29, 1976. This Peti-

tion for Certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented.

1. Whether the Court of Appeals erred in considering acts and words of co-conspirators made outside the presence of and without the knowledge or authorization of petitioner, in affirming his conviction for conspiracy.

2. Whether the Court of Appeals committed prejudicial error in receiving and considering an unsolicited and ex parte letter from the Assistant United States Attorney, filed subsequent to oral argument before the Court.

Statement of the Case.

The Government introduced evidence that there existed international conspiracy to ship heroin through the mails from Thailand to the United States. The members of the conspiracy were Boonterm Petkamnerd, his brother Perm, and Manop Saiphantong, who were the suppliers. Donald Head, a Staff Sergeant with the United States Air Force, assigned as a postal clerk at the Don Muang Air Force Post Office in Bangkok, Thailand, was responsible for mailing the heroin into the United States. Boonsak Phuvasitkul was responsible for collecting payment in the United States. The petitioner, Bruce Wheaton, was alleged to be a salesman and distributor.

The conspiracy originated in September of 1975, when Boonsak first approached Manop and Boonterm regarding the purchase of heroin. It came to an end when heroin was actually shipped to New York City

and received by the Drug Enforcement Administration on February 23, 1976.

Nearly the entire case against the petitioner was presented through Boonsak, who had been arrested by the purported "purchasers" of the heroin, Special Agents "Jack" and "Andy". The Government agreed to dismiss several of the counts against Boonsak in exchange for his friendly testimony.

During the trial, Boonsak told of extrajudicial statements made to him by Manop that the petitioner was at the Chevolit Hotel in Bangkok, Thailand on February 16, 1976. The purpose of petitioner's presence was alleged to be to purchase three units (approximately 700 grams per unit) of heroin. Later Manop told Boonsak that the petitioner had purchased the heroin and that it was in transit to the United States early in March 1976. The shipping arrangements were said to have been made by Don Head. Boonsak's hearsay testimony was received subject to connection.

Boonsak testified that before he left Thailand for New York City Boonterm gave him Boonterm's Thai National Identification Card and a slip of paper bearing the petitioner's name and address. Boonsak was told by Boonterm to visit the petitioner while in New York and collect a $20,000 debt owed to Boonterm. Boonsak later showed the slip of paper to Special Agents Jack and Andy and told them they could quickly purchase 2 or 3 units of heroin from the petitioner. His information, of course, was based upon what Manop told him. The slip of paper was introduced into evidence. The prosecutor argued to the jury that the $20,000 was owed from a prior drug deal.

After Boonsak's arrest, he was taken to the Drug Enforcement Administration Offices in New York City,

where at the direction of Drug Enforcement Administration agents he made numerous telephone calls to various co-conspirators. One such call was made to the petitioner in Carson, California on March 23, 1976. The taped conversation was introduced and relevant transcribed portions follow:

BOONSAK: Ah—I—before I came here Boonterm gave me your address in Bronx. I went down there, I never see you. They said you went to Bangkok. And I call to Boonterm last night. Boonterm give me this number to get in touch with you.

WHEATON: Yes, what's up?

BOONSAK: Ya. I, I, I need some help from you.

WHEATON: Like what?

BOONSAK: Yes, uh—I got the merchandise, two units, you know, they send it from Bangkok. Boonterm send it to me, but I cannot entrust the customer here because I deal this bus, business with him before, but this time they try to cheating me; I have two units in here. I try you to help me. Don, do you know Don, right?

WHEATON: Um hum.

BOONSAK: Donald Head, yah he send it to me. Can you help me that?

WHEATON: I don't know. I'll have to get back with you man because I not going to be in New York for a while now.

BOONSAK: I see; when will you be coming here?

WHEATON: Um—I don't know right yet. What's you telephone number, man?

. . .

WHEATON, What's your name? Boonsak, ah?

BOONSAK: Yeah, my my first name is Boonsak.

. . .

Boonsak then describes himself to Wheaton.

. . .

WHEATON: What time, what time do you work from? What time do you get off from work? Do you go to school? What you do?

BOONSAK: Me?

WHEATON: Yeah.

BOONSAK: I, I just come over for you know for, for business for a couple of days. I want to leave as soon as possible when I finish this. But, I don't know how to do this two units, you know.

. . .

BOONSAK: Ah, you why don't you call me tonight at the hotel?

WHEATON: Yeah, around what time, what's a good time?

BOONSAK: The good time? Is about ah—let me, let me do appointment about? about about 7, 7 o'clock or 6:30 to 7:00 o'clock, how about that?

WHEATON: Yeah, yeah, that's good.

BOONSAK: Okay, you call me at about that time.

WHEATON: Yeah.

. . .

BOONSAK: Please help me, okay, because I don't know anything well, you know. I have two units in here, but I don't know how to do it.

WHEATON: Um.

BOONSAK: And, why not, if you can help me you take this two units then after you selling you send the money to the Boonterm directly, okay.

WHEATON: Um hum.

BOONSAK: It's the best way to do it because I cannot bring the money. Do you have any idea I can bring the money out of this country?

WHEATON: No, unless you could send it to him.

BOONSAK: Yeah, would you please, okay?

WHEATON: Um.

BOONSAK: Ah, I, excuse me Bruce, let me ask you one question, how, how much do you think you can sell this for him? I can when I go back to Thailand, I can . . .

WHEATON: I, I don't know, man. I don't know. Don't ask me that question on the phone, man.

BOONSAK: Oh, I see.

WHEATON: Alright, talk to you later.

BOONSAK: Okay, okay, thank you very much.

The petitioner never called Boonsak back.

Following the conversation, the government seized a letter addressed to the petitioner at the post office. The letter was introduced at the trial and follows:

"UTAPAO
8 March 1976
Bruce my dear friend

I hope this letter find you in the best of health.

Bruce this time I consign to you (½) harp 'tur' because my merchant friend can't to get me thats. I want and my brother not belief me. I think the time will show him. (my brother).

Bruce I hope you will not forget me and I remember our last time.

I hope our work will do more on the plan as we talk about at hotel.

And hope everything will be finish in this month March. I close now hope hear from you soon.

From your friend
Boonterm."

It is important to note that the letter was never delivered, so the petitioner never saw the letter. Also, the writer, Boonterm, was not available for cross-examination.

The Government introduced the heroin which was mailed into New York on February 23, 1976. However, the Government never introduced any evidence that the petitioner possessed any heroin or any large sum of money. It presented no direct proof that the petitioner met with any of the conspirators while at the Chevalit Hotel in Bangkok on February 26, 1976.

The jury found the petitioner guilty of conspiracy to manufacture heroin, conspiracy to import it into the United States, conspiracy to distribute the heroin in the United States, importation of 638 grams of heroin into the United States on February 23, 1976, and distribution of 638 grams of heroin on February 23, 1976.

After the verdict was imposed, but before the petitioner was sentenced, the Assistant United States Attorney who prosecuted the case, Federico E. Virella, Jr., submitted to the trial judge a personal, unsolicited letter in which he requested the maximum sentence for the petitioner, who was described as a peddler of "white death". The trial judge said he did not read or consider the improper letter in imposing sentence. Nevertheless, he read enough of the letter to know what the contents concerned. The judge chastised Mr. Virella "never to do anything like that again". He then sentenced the petitioner to fifteen years in prison to be followed by three years special parole.

A notice of appeal to the Court of Appeals for the Second Circuit was duly filed. Petitioner prepared

and filed a timely opening brief. The Government, again by Mr. Virella, filed a reply brief. The case was called for argument on October 1, 1976. During oral argument Mr. Virella was requested to cite specific words or deeds of the petitioner which indicated he was a knowing part of the conspiracy. Mr. Virella could not answer the question. However, he at no time requested permission to file an additional or supplemental brief. Consequently no leave was granted by the court. Counsel for petitioner took an airline flight back to California, where he maintains the practice of law.

Several days later Mr. Virella again gave a private letter to the judges. Counsel for petitioner was sent a copy of the letter, but was 3,000 miles away when the letter was presented. The letter was in the nature of a supplemental brief. It cited many cases which had been cited in the Government's reply brief. It also cited additional cases which supported the Government's contentions. One such additional case appeared in the letter as well as in the court's opinion.

Upon receiving a copy of this letter, counsel immediately wrote to the court requesting leave to file a supplemental brief. No leave was granted.

The conviction of petitioner was affirmed by the Court of Appeals for the Second Circuit on November 29, 1976. The court cited four items of proof which the court termed independent evidence which corroborated the hearsay declarations of co-conspirators and implicated the petitioner in the conspiracy. See page 653 of the Opinion, in Appendix hereto.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Conflicts With the Decisions of Other Courts of Appeal as to the Adequacy of Independent Evidence Which Must Be Produced to Corroborate the Hearsay Testimony of a Co-Conspirator.

Nearly the entire case against the petitioner was presented through a co-conspirator, Boonsak Phuvasitkul. Much of the role which petitioner supposedly played in the conspiracy was established only because Manop or Boonterm told Boonsak that the petitioner was a participant, and Boonsak then told the jury. Boonsak never met the petitioner. Neither Manop nor Boonterm testified, so could not be cross-examined.

The courts below justified the admission of conspirator's hearsay upon four items of evidence. First, the telephone conversation containing admissions by petitioner that he didn't know if he could help Boonsak dispose of the "merchandise", the petitioner's agreement to call Boonsak back, and to Boonsak's question regarding how much he could sell the drug for petitioner's response that "I don't know, man. I don't know. Don't ask me that question on the phone, man."

The second piece of corroborative evidence relied upon was Boonsak's "verbal act testimony that he had come to the United States to collect money from Wheaton" which the court below termed "not admissible to establish that money was owed", but "was admissible to explain his presence in the United States and set the background for his telephone call." No matter whether this testimony is considered pure hearsay as argued below, or "verbal act" testimony, it remains that the statement was not made by the petitioner, but by a co-conspirator.

Third, the court below relied upon the petitioner's presence in Thailand "the week preceding the call" (from Boonsak). It must be recognized that other than co-conspirator's hearsay testimony, the record is devoid of any evidence to establish that the petitioner ever met with any of the conspirators.

Finally, the court pointed to the "letter from the drug supplier to Wheaton, omitting any reference to its contents", which "supported the inference that there was some relationship between them." Petitioner argues below that the letter was inadmissible hearsay by a co-conspirator, but will assume, *arguendo,* that it was independent evidence. Even so, it remains the statement of a conspirator.

The Government's entire case depended upon these four items of evidence being classified as independent evidence. It did not offer any evidence that the petitioner touched, possessed or sold any heroin. It offered no evidence that he received, used, passed or touched any money in the purported transaction.

In holding that there was adequate independent evidence of petitioner's complicity in the conspiracy, the court's opinion conflicts with *UNITED STATES vs ONG WAY JONG,* (1957) 245 F.2d 392, decided in the 9th Circuit. As in the instant case, the case against Ong was presented through a co-conspirator by the name of Wee. Wee testified that defendant Ong was his "connection". In addition, when agents attempted to purchase heroin from Wee agents observed him meet with Ong, then proceed directly to consummate the sale.

The court reversed defendant's conviction because nobody "directly testified" to Ong's connection with

the conspiracy charged. "Guilt by association would be the only basis." *ONG WAY JONG, supra* at 394. Special emphasis was placed on the fact that Ong was never "shown to have touched, possessed, sold or conspired to sell narcotics . . . Ong is not shown to have received, used, passed or touched any money used in the transaction.

In the case at bar, the petitioner was not arrested with any money. He was not shown to have any connection with any heroin. Direct evidence of petitioner's guilt is wholly lacking. There are only statements of co-conspirators, a visit to Thailand, and a vague telephone conversation.

Certainly in *ONG* there was much more substantial evidence of complicity. Agents observed a meeting with the defendant, described as a "connection", and then arrested Wee for the illegal sale. Yet the 9th Circuit could not find sufficient independent evidence to allow admission of the co-conspirator's hearsay.

In the *UNITED STATES vs PANCI,* (1958 CA 5th LA) 256 F.2d 308, the trial court allowed co-conspirator's hearsay which implicated the defendant after he was shown to have met with conspirators. The Court of Appeals reversed the conviction because the independent evidence only showed that the defendant associated with disreputable characters. Similarly, if statements of co-conspirators are excluded, the petitioner is only shown to have been in the same country as conspirators and to arguably have some knowledge of drug transactions.

In the *UNITED STATES vs GLOVER,* (1962 CA 10 COLO.) 306 F.2d 594, the defendant and Irwin were charged with conspiracy to sell and facilitate

transportation of heroin. Like in the instant case, Irwin sold heroin to Government agents, was arrested, and made hearsay statements inculpating the defendant. The hearsay declarations of Irwin were admitted after the following independent evidence: (1) the defendant and Irwin were seen together by Government agents; (2) Irwin's statements that defendant was part of the conspiracy; (3) when agents asked defendant if they "could do some business together" defendant answered they could not until "Norman Smith" got back.

Petitioner submits that independent evidence in *GLOVER* was stronger than that against petitioner. Nobody testified that they saw petitioner meet with conspirators. Boonsak did not even know petitioner. Petitioner's telephone conversation with Boonsak certainly was no more incriminating than the conversation in *GLOVER*. Both cases have statements by co-conspirators made outside the presence of the defendant. Yet the 10th Circuit reversed for lack of adequate independent evidence, and the 2nd Circuit affirmed.

In reversing *GLOVER* the court said "The existence of the conspiracy cannot be established against an alleged conspirator by evidence of acts or declarations of his alleged co-conspirators, done or made in his absence." *GLOVER, supra,* at 595. Yet the 2nd Circuit relied on Boonsak's statement that he was in the United States to collect a debt from the petitioner and on Boonterm's letter to petitioner in finding independent evidence to allow the hearsay before the jury.

The above cited cases indicate that the different circuits vary in the amount of independent evidence each requires before hearsay of co-conspirators will be admitted. An authoritative decision is needed by this court to resolve the inconsistencies between circuits.

2. The Decision Below Was in Error.

The court stated that no corroborative evidence of petitioner's guilt was necessary because his admissions in the taped telephone conversation made during the course of the alleged conspiracy were sufficient. *Buford vs United States,* (1959 CA 9) 272 F.2d 483, 486 n.1 was cited as authority for the statement. While the rule set forth is an accurate statement of law, it is inapplicable to the petitioner's case.

The admissions contained in a taped conversation of the defendant in *Buford* were of the actual agreement to sell cocaine. The damaging statements were made concurrently with the accomplishment of the illegal act which was the purpose of the conspiracy—the sale of cocaine.

However, in the instant case all acts necessary to the completion of the unlawful purpose were complete when the admissions were made. The phone call was made on March 23, 1976. The heroin was seized by the DEA on February 23, 1976. Since the conspiracy charged was conspiracy to manufacture, import and distribute heroin and the drug was "distributed" to agents by the time of the phone call, the conspiracy had ended. Therefore, the admissions were not made during the course of the conspiracy, *Buford* is inapplicable and corroboration was a necessity. It must be noticed that the "admissions" the court spoke of are extremely vague responses to loaded questions staged by Government agents. One must question if the conversation is proof at all.

The court then relied on three additional items of evidence which it said corroborate co-conspirator hearsay. First was the "verbal act" testimony that Boonsak

had come to the United States to collect money from petitioner. "[W]hile not admissible to establish that money was owed, (it) was admissible to explain his presence in the United States and set the background for his telephone call." The problem with the argument is that the testimony was not used for such a limited purpose. The prosecutor argued to the jury that not only was there a $20,000 debt owed, but that it was owed "from a prior shipment of heroin." (p. 127, line 13, Trial Transcript). It was used as proof of the matter asserted, that there was a $20,000 debt owed. The statement was pure hearsay by a co-conspirator. It was not adequate as independent corroborative evidence.

The second shred of corroboration was said to be petitioner's presence in Thailand. The court failed to mention, however, that petitioner did not arrive in Thailand until February 26, 1976—three days after DEA agents had seized the heroin in New York City. Additionally, there was no direct evidence that petitioner ever met with any of the conspirators. The court evidently relied on Boonsak's hearsay testimony that such a meeting occurred. It therefore is not corroborative. Even if it were, association with conspirators is not evidence that one is a conspirator. *UNITED STATES vs ONG WAY JONG, supra.*

Lastly, the court relied on the letter from the drug supplier, Boonterm, to petitioner, which "omitting any reference to its contents, supported the inference that there was some relationship between them." Of course it is impossible to separate the contents of a letter from the letter itself. In fact, the letter was used to show that petitioner was assigned drugs to sell.

It is hearsay. It cannot be used as independent corroborative evidence.

Even if only the fact of sending the letter is used, it only shows that Boonterm knew petitioner, not that petitioner knew Boonterm. Petitioner never received the letter. An attempt by a conspirator to involve an outsider cannot make the outsider a member of the conspiracy. This situation is one step removed from voluntary association with conspirators, which the court in *ONG WAY JONG, supra,* said was not enough to make one a conspirator.

After close examination of the "independent" evidence cited by the court below, it appears that it is not independent at all. The "verbal act" testimony is hearsay. The letter is hearsay. The meeting in Thailand relies on hearsay. One is left with the ambiguous telephone conversation after the end of the conspiracy, with a captured conspirator puppeting the words of Government agents. Petitioner submits those are inadequate independent evidence of his complicity. Petitioner has been convicted by the improper use of co-conspirator hearsay.

3. The Decision Below Raises a Significant Question as to the Fairness of Petitioner's Conviction.

Petitioner was arrested at his permanent residence in Carson, California. An identity hearing was held and petitioner was held for trial in New York City. Had the petitioner been tried within the jurisdiction of the Ninth Circuit, the cases indicate that much more evidence of his guilt would be required to convict. *ONG WAY JONG, supra.* However, he was tried within the jurisdiction of the Second Circuit. The trial judge allowed co-conspirator hearsay after meager corrobora-

tion. The Court of Appeals affirmed. The trial judge looked at an ex parte sentencing memorandum from the Assistant U.S. Attorney. Such conduct in the 9th Circuit surely would have been grounds for mistrial. The Court of Appeals considered a letter from the same Assistant U.S. Attorney without benefit of opposing counsel's letter.

What emerges is a differing standard of justice between circuits. Petitioner humbly submits it is grossly unfair to remove him from his own jurisdiction and allow him to be tried in another federal jurisdiction utilizing much more lax trial procedures.

4. The Court of Appeals Committed Prejudicial Error in Receiving and Considering an Unsolicited and Ex Parte Letter From the Assistant United States Attorney, Filed Subsequent to Oral Argument Before the Court.

After oral argument before the Court of Appeals, the appellee, by the Assistant United States Attorney Federico E. Virella, Jr., submitted a letter addressed to the panel of judges who heard argument. The letter is contained in the Appendix hereto.

In the letter Mr. Virella cited additional cases which supported certain propositions he advanced during argument. He had requested no leave of court to submit an additional or supplemental brief. The letter contained no proof of service on opposing counsel, although counsel did receive a copy of the letter.

Upon receipt of the letter counsel for petitioner immediately objected to the court to the submission of such an unethical and unorthodox document and requested leave to file a reply brief. Permission was denied.

It is apparent that the court relied on the letter in rendering its decision. A case cited for the first time in the letter, *UNITED STATES vs NUCCIO*, 373 F.2d 168 (2d Cir.), cert. denied, 387 U.S. 906 (1967) was also cited in the court's opinion (p. 653 opinion below). Use of the letter and the cases therein was absolutely improper since counsel for petitioner was denied permission to counter the letter with a brief of his own.

One of the fundamental notions in American jurisprudence is that of an adversary trial. Both sides must be vigorously represented before the bench or justice will not prevail. This has been so since colonial times. As was said by the court in *SPIRO vs NITKIN* (1899) 72 CONN 202, 203, 44 A 13, 14:

> To permit the counsel upon one side of a case to argue it in the absence of his opponent, and without his knowledge, or notice to him, and without giving him an opportunity to reply, would be such a denial of the right of a party to be heard in court, and such a departure from the usual and regular methods of procedure, as would warrant the granting of a new trial.

The court must take notice that the Assistant United States Attorney in the instant case has consistently made such conduct a common practice. He submitted a personal letter to the trial judge for which the judge chastized him. Then he submitted another one, the letter presently under consideration.

Petitioner submits that such conduct is not only unethical, but prejudicial. "Though the only effect of reading the brief may have been to confirm the judge in the opinion which he had already formed, that

opinion might have been changed had the plaintiff replied to the argument of the defendant's brief." *SPIRO vs NITKIN, supra,* page 15. The court in *SPIRO* granted a new trial. Petitioner requests that this court grant the petition for certiorari herein.

Conclusion.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

ARNOLD M. COWAN,

Counsel for Petitioner.

December 28, 1976.

APPENDIX.

Opinion of the United States Court of Appeals.

United States Court of Appeals for the Second Circuit.

Nos. 217, 261—September Term, 1976. (Argued October 1, 1976. Decided November 29, 1976.) Docket Nos. 76-1249, 76-1271.

United States of America, *Appellee,* v. Donald Head a/k/a "Mr. Don", and Bruce Wheaton, *Defendants-Appellants.*

Before:

Feinberg, Gurfein and Van Graafeiland, *Circuit Judges.*

Appeal from judgments of conviction for violations of federal narcotic laws entered in the United States District Court for the Southern District of New York after separate jury trials before Hon. Lloyd F. MacMahon, *J.*

Affirmed.

Irving Perl, New York, N. Y., *for Defendant-Appellant Head.*

Arnold M. Cowan, Redondo Beach, Calif. (Abraham Solomon, New York, N. Y., of counsel), *for Defendant-Appellant Wheaton.*

Federico E. Virella, Jr., Assistant U.S. Attorney (Robert B. Fiske, Jr., U.S. Attorney for the Southern District of New York; Paul Vizcarrondo, Jr., Assistant U.S. Attorney), *for Appellee.*

Van Graafeiland, *Circuit Judge:*

In January of 1976, Jack Taylor, an undercover agent with the Drug Enforcement Administration, had several telephone conversations with Boonsak Phuvasitkul, a resident of Thailand, concerning the proposed purchase of a unit of heroin which would be mailed from Thailand to the United States through the United States Air Force postal system. Events which followed rapidly thereafter led to the arrest and conviction of appellants on one conspiracy count of manufacturing, importing and distributing heroin, one substantive count of importing and one of distributing heroin. Although appellants were tried separately, their appeals were heard together. Phuvasitkul, who was also indicted, pleaded guilty to the second substantive count and another count on which appellants were not tried, and testified as a government witness.

The government's proof established that appellant Head, a staff sergeant stationed at the air mail terminal at Don Muang Airport outside Bangkok, was the key man in the smuggling operation. As chief supervisor of a shift, Head was responsible for the receiving, dispatching and inspecting of all incoming and outgoing mail, and he had developed a method of packaging heroin for mailing so that it would escape detection by dogs or x-ray.

At a meeting with Phuvasitkul in Bangkok on February 4, 1976, Head agreed to mail a unit of heroin to New York. The package was mailed to a post office address in New York City where it was seized by a DEA agent. Analysis showed the contents to be 638 grams of heroin. While en route to the United States to pick up the money for the heroin which

had been mailed, Phuvasitkul met agent Taylor, acting in an undercover capacity, in Toronto, where arrangements for payment were discussed. Phuvasitkul told Taylor at that time that Head had also mailed two or three units to appellant Wheaton and that Phuvasitkul was to contact Wheaton with instructions for making payment. Upon his arrival in New York, Phuvasitkul was placed under arrest. Several weeks later, Wheaton was arrested in California.

In arguing for reversal of his conviction, Head makes the now routine claim of a single conspiracy charged and multiple conspiracies proven, and also contends that unfair comments were made by both judge and prosecutor. Neither contention merits extended discussion. Appellant did not request a charge on multiple conspiracies, took no exception to the charge as given, and comes ill-equipped to this Court asserting error. *See United States v. Indiviglio,* 352 F.2d 276, 280 (2d Cir. 1965), *cert. denied,* 383 U.S. 907 (1966). Moreover, because he makes no showing of prejudice resulting from the asserted multiplicity, his argument is unpersuasive. *See United States v. Sir Kue Chin,* 534 F.2d 1032, 1035 (2d Cir. 1976).

Some strong comments were made by the trial judge which would have been better left unsaid. However, in view of the overwhelming proof of Head's guilt, we do no more than express our disapproval of what was said. Appellant found no fault with the prosecutor's summation when it was given. *See United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 238-39 (1940). We think his initial reaction was correct.

Head's only claim of any substance arises out of the seizure of a package containing $26,800 in currency

at the time of his arrest in Bangkok. Pursuant to 39 U.S.C. § 406, the Don Muang airmail terminal was under the supervision and control of the air force, which had established written procedures for customs examination of official and personal mail. Among these was a provision that fluoroscopy would be used by military postal personnel as directed by the military department which operates the post office. As one of the persons responsible for making such inspections, appellant must have been aware that fluoroscoping was routinely being done.

On March 9, 1976, Head's commanding officer was informed by the air force Office of Special Investigations that a person fitting Head's description was believed to be involved in narcotics trafficking. A registered parcel addressed to Head was examined under a fluoroscope, and the parcel showed outlines of what appeared to be stacks of currency. After Head had picked up this package on the following day, he was placed under arrest with the package in his possession, pursuant to a complaint which had, in the meantime, been filed against him in New York. At the request of OSI, a search warrant was issued by the Commanding Officer for Air Force Personnel as authorized by chapter 152 of the Manual for Courts Martial, following which the package was opened and the currency found. Appellant asserts that his motion to suppress this evidence as the product of an illegal search was improperly denied.

In view of the strength of the government's case against Head, consisting among other things of extremely incriminating taped conversations, appellant is asserting what, at most, would be harmless error. *United States ex rel. Stanbridge v. Zelker,* 514 F.2d 45, 52 (2d Cir.) *cert. denied,* 423 U.S. 872 (1975); *United States v. Anderson,* 500 F.2d 1311, 1318-19 (5th Cir. 1974). In actuality, there was no error at all. Head's constitutional right of privacy must be measured by whether he had an expectation of privacy which society was prepared to recognize as reasonable. *Katz v. United States,* 389 U.S. 347, 361 (1967). Because "the military is, by necessity, a specialized society separate from civilian society", *Parker v. Levy,* 417 U.S. 733, 743 (1974), and there are serious drug problems in military installations, *see Schlesinger v. Councilman,* 420 U.S. 738, 760 n. 34 (1975), the limited invasion of privacy in the fluoroscoping, which must have been anticipated by appellant, was not constitutionally objectionable. *See Committee for GI Rights v. Callaway,* 518 F.2d 466, 474-77 (D.C. Cir. 1975); *cf. United States v. Edwards, supra,* 498 F.2d 496, 499-501 (2d Cir. 1974). Moreover, the opening and search of the offending package did not take place until after a valid search warrant had been issued by the commanding officer. Appellant's motion to suppress the money found in the search was properly denied.

Appellant Wheaton had also been a member of the United States Air Force and was stationed in Thailand from January 1972 until January 1973. When Phuvasitkul met with Taylor in Toronto, he showed Taylor a piece of paper with Wheaton's name and address on it and stated that while he was in the United States he was going to try to collect from Wheaton moneys owed to an individual who was the supplier of drugs in Thailand. Phuvasitkul also had in his possession the national identity card of the

drug supplier so that he would be able to identify himself to Wheaton.

Subsequent to Phuvasitkul's arrest, he said that he had been told by his supplier that Wheaton had returned to Thailand in February and had purchased two or three units of heroin which were being mailed to the United States by Head. A telephone conversation between Phuvasitkul and his supplier, taped by the DEA on March 9, 1976, established that Wheaton had left Thailand and that two units of heroin had been mailed to him. Following up on this information, the government intercepted a letter from the supplier to Wheaton dated March 8, 1976 stating that one-half unit, 300 grams, of heroin was being assigned to him. The government also established that Wheaton was in Thailand between February 23, 1976 and March 5, 1976 where he was registered at the Chavalit Hotel in Bangkok.

Following his arrest, and at the suggestion of DEA, Phuvasitkul made a taped telephone call to Wheaton, telling him that the two units of "merchandise" had been sent to Phuvasitkul by the Thailand supplier and that he had been instructed to call Wheaton whose number had been given him by the supplier. Wheaton, who was then living in California, said he didn't know whether he would be able to help Phuvasitkul and that he would get back to him, because he was not going to be in New York for a while. Wheaton took Phuvasitkul's telephone number and agreed to call him back that night. Wheaton also agreed that, if he took the two units, he would send the money for them directly to the supplier in Thailand. Phuvasitkul asked Wheaton how much he thought he could sell the drug for, and the reply was, "I don't know, man. I don't know. Don't ask me the question on the phone, man."

Wheaton's contention that there was insufficient proof of his participation in the conspiracy and that hearsay statements of his alleged co-conspirators should not have been admitted into evidence must be rejected. Proof of the existence of the conspiracy to import heroin could be, and was, established without reference to any acts of Wheaton. *United States v. Araujo,* 539 F.2d 287, 289 (2d Cir. 1976). This being so, it was for the trial judge to determine whether Wheaton's participation in the conspiracy was established by a fair preponderance of independent evidence before the hearsay statements of his co-conspirators could be used against him. *United States v. Wiley,* 519 F.2d 1348, 1350 (2d Cir. 1975), *cert. denied,* 423 U.S. 1058 (1976). We are not prepared to say that the trial court erred in holding that the government's proof met this test.

The admissions made by Wheaton in his taped conversation with Phuvasitkul were made during the course of the alleged conspiracy, rather than after its consummation, and may be sufficient to establish Wheaton's guilt even without corroboration. *Buford v. United States,* 272 F.2d 483, 486 n. 1 (9th Cir. 1959). However, if corroboration was required, it was there. A conspiracy had been shown to exist. Phuvasitkul's "verbal act" testimony that he had come to the United States to collect money from Wheaton, while not admissible to establish that money was owed, was admissible to explain his presence in the United States and set the background for his telephone call. *United States v. Nuccio,* 373 F.2d 168, 173 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967). The presence of Wheaton in Thailand during the week preceding the call became significant after the statements made by Wheaton on

the telephone. The letter from the drug supplier to Wheaton, omitting any reference to its contents, supported the inference that there was some relationship between them. *United States v. Panebianco,* (Dkt. Nos. 76-1132, 76-1133, 76-1151, 76-1206, 76-1207, 76-1219, 76-1366) (2d Cir. Oct. 14, 1976), slip opin. 119, 133-34; *United States v. Ruiz,* 477 F.2d 918, 919 (2d Cir. 1973), *cert. denied,* 414 U.S. 1004 (1974).

When, as in this case, the existence of a conspiracy has been shown, evidence sufficient to link another defendant with it need not be overwhelming, *see United States v. Marrapese,* 486 F.2d 918, 921 (2d Cir. 1973), *cert. denied,* 415 U.S. 994 (1974), and it may be circumstantial in nature. *United States v. Manfredi,* 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974). Examining the evidence below in the light most favorable to the government, as we are required to do, *United States v. Marrapese, supra,* 486 F.2d at 921, we think it was sufficient. This being so, testimony as to the acts and statements of Wheaton's co-conspirators in furtherance of the conspiracy, which we need not recount herein, was properly admitted into evidence. Under *Pinkerton v. United States,* 328 U.S. 640 (1946), Wheaton also became responsible for the substantive illegal acts of his co-conspirators, done in furtherance of the conspiracy, even though he may not have participated directly in them.

Finding no reason to disturb the jury's verdict on either trial, the judgments of convictions are affirmed.

October 4, 1976

FEV:sr
n-2756

Hon. Wilfred Feinberg
Hon. Murray I. Gurfein
Hon. Ellsworth A. Van Graafeiland
United States Courthouse
Foley Square
New York, New York 10007

Re: United States v. Donald Head, a/k/a
"Mr. Don", and Bruce Wheaton,
Dkt. Nos. 76-1249, 76-1271

Honorable Sirs:

During oral arguments in the above matter, the Court questioned the sufficiency of the evidence, independent of the hearsay declarations of the conspirators, showing Wheaton's participation in the conspiracy. We wish to bring to the Court's attention several cases, in addition to the ones cited in the Government's brief, supporting Judge MacMahon's finding that the Government had satisfied its burden of proof under *United States v. Geaney,* 417 F.2d 1116 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028 (1970).

Evidence supporting a *Geaney* finding may be completely circumstantial, *United States v. Manfredi,* 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied,* 417 U.S. 963 (1974), and may include statements that are not hearsay or that are admissible under an exception to the hearsay rule other than the exception for statements of co-conspirators. *United States v. Geaney, supra,* 417 F.2d at 1120 n.3. As noted in the Government's brief on appeal, therefore, the slip of paper bearing Wheaton's name and New York address that Boonterm gave Boonsak on February 4, 1976, and Boonterm's contemporaneous statement to Boonsak, were properly considered by Judge MacMahon in mak-

ing the *Geaney* finding. The slip of paper was admissible as circumstantial evidence of association and agreement between Boonterm, the heroin supplier, and Wheaton. *United States v. Ruiz*, 477 F.2d 918, 919 (2d Cir. 1973), *cert. denied*, 414 U.S. 1004 (1974) (slip of paper found on co-conspirator bearing defendant's nickname and telephone number "almost identical" to defendant's telephone number held not to be hearsay); *United States v. Ellis*, 461 F.2d 962, 970 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972) (address books of co-conspirators containing defendant's name held not to be hearsay); *United States v. Garelle*, 438 F.2d 366, 370 (2d Cir. 1970), *cert. denied*, 401 U.S. 967 (1971) (address book of co-conspirator containing defendant's name held not to be hearsay). Boonterm's contemporaneous instruction to Boonsak to visit Wheaton in New York and tell him that he should send the $20,000 he owed Boonterm was also properly considered by Judge MacMahon and provided additional support for his *Geaney* finding. The statement was a verbal act showing the existence of the conspiracy and made in furtherance of it (i.e., an attempt by the supplier, Boonterm, to obtain payment from a distributor), *United States v. Nuccio*, 373 F.2d 168, 170 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); and was also an utterance contemporaneous with an independently admissible nonverbal act (the handing of the slip of paper by Boonterm to Boonsak) that related to that act and threw some light on it. *United States v. Frank*, 494 F.2d 145, 155 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974); *United States v. Manfredi*, 488 F.2d 588, 596 (2d Cir. 1973), *cert. denied*, 417 U.S. 963 (1974); *United States v. Glasser*, 443 F.2d 994, 999 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

When these events of February 4, 1976 are considered in conjunction with Boonsak's telephone conversation with Wheaton of March 23, 1976—which, taken in its totality, shows that Wheaton was familiar with the operation of the heroin distribution conspiracy and was willing to aid Boonsak in advancing the conspiracy's objects—it is clear that Judge MacMahon was warranted in finding that the Government had met its burden of proving by a fair preponderance of the evidence, independent of hearsay statements of the conspirators, that Wheaton was a member of the conspiracy at least from early February, 1976 until his arrest in March, 1976. Indeed, we respectfully submit that the evidence here was stronger than in other cases where this Court has upheld a *Geaney* finding. See, *e.g.*, *United States v. D'Amato*, 493 F.2d 359, 363-64 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States v. Manfredi*, *supra*.

Respectfully,

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